UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PATRICK SCOTT BAKER, *et al.*,

Petitioners,

v.

NATIONAL BANK OF EGYPT, *et al.*,

Defendants.

12-cv-7698 (GBD)

STATEMENT OF INTEREST OF THE UNITED STATES

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PRELIMINARY STATEMENT

The United States (the "Government") respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517,[1] to set forth its views concerning the proper application of the law with respect to the attachment of property, including electronic funds transfers ("EFTs"), that have been blocked pursuant to economic sanctions imposed by the United States. More specifically, this Statement of Interest discusses the asserted applicability to this case of a September 24, 2015, slip opinion ruling in *Vera v. Republic of Cuba*, 12 Civ. 1596 (AKH) (the "*Vera* Slip Op." or "*Vera*"). *See* ECF No. 440.

The United States supports remedies available under the law for victims of terrorism. At the same time, the Government has a significant interest in ensuring the proper administration of the laws and regulations at issue in this case concerning foreign economic sanctions, which are an important tool in furtherance of the foreign policy and national security of the United States, including the nation's fight against terrorism.

As both parties recognize, where otherwise appropriate under the law, Second Circuit precedent holds that a blocked EFT may be attached only where the sanctioned state itself or an agency or instrumentality thereof directly transmitted that EFT to the bank where it is currently held. Petitioners attempt to circumvent this limitation by citing the unreported decision in *Vera*, in which Judge Hellerstein held that by virtue of not being interpled or by failing to respond to an interpleader petition, banks that directly transmitted the blocked assets had disclaimed their interest in the accounts, and the assets were thus subject to attachment. The Government

[1] Pursuant to 28 U.S.C. § 517, "[t]he Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in a suit pending in a court of the United States, or in a court of a State, or to attend to any other interest of the United States."

maintains that *Vera* was wrongly decided and, accordingly, this Court should decline Petitioners' invitation to apply its reasoning here. *Vera* does not address, and conflicts with, governing regulations issued by the Office of Foreign Assets Control ("OFAC"), under which a foreign bank cannot surrender or release its interest in property intended to be transferred to a sanctioned person or government which is blocked in the United States. *See, e.g.*, 31 C.F.R. §§ 515.201(b)(2), 515.310 (provisions of the Cuban Asset Control Regulations ("CACR") at issue in *Vera*), 31 C.F.R. §§ 542.201(a), 542.317 (corresponding provisions of the Syrian Sanctions Regulations ("SSR") barring "transfer[]" of property and interests in property of the Government of Syria and other persons blocked under the SSR, and defining "transfer" as, among other things, any "act or transaction . . . the purpose, intent, or effect of which is to . . . surrender [or] release . . . any right . . . or interest with respect to any property"). Any such attempted surrender or release would be null and void, and accordingly could not be the basis for the recognition of any interest or right with respect to that property. 31 C.F.R. §§ 515.203(a) (Cuba), 542.202(a) (Syria). Accordingly, as the United States has advised courts in other cases,[2] assets such as those at issue here cannot be attached under the relevant statutory provisions.

BACKGROUND

A. Statutory and Regulatory Background

Under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602 *et seq.*, a foreign state is immune from the jurisdiction of federal and state courts except as provided by certain international agreements and statutory exceptions. *See* 28 U.S.C. § 1604. The available

[2] *See, e.g.,* Amicus Brief for the United States, *Calderon-Cardona v. Bank of New York Mellon,* Case No.12-75 (2d. Cir. Sept. 21, 2012); Statement of Interest of the United States, *Martinez v. Cuba*, No. 07 Civ. 6607 (S.D.N.Y. Dec. 14, 2015).

exceptions include the so-called "terrorism exception," which, under limited circumstances, abrogates a foreign state's sovereign immunity in cases involving terrorist acts. *See* 28 U.S.C. § 1605A. A foreign state's assets likewise generally are immune from attachment under the FSIA, subject to certain exceptions. *See* 28 U.S.C. § 1609. These exceptions allow certain property of a foreign state and its agencies and instrumentalities to be attached to satisfy judgments entered in cases brought under the terrorism exception. *See* 28 U.S.C. § 1610(a)(7), 1610(b)(3), 1610(g)(1).

In addition, the Terrorism Risk Insurance Act ("TRIA") also permits the attachment of certain "blocked assets" of a foreign state. *See* Pub. L. No. 107-279, § 201, 116 Stat. 2322 (codified at 28 U.S.C. § 1610 note). Section 201(a) of TRIA states:

> Notwithstanding any other provision of law . . . , in every case in which a person has obtained a judgment against a terrorist party on a claim based upon an act of terrorism, or for which a terrorist party is not immune under [28 U.S.C. § 1605A], the blocked assets of that terrorist party (including blocked assets of any agency or instrumentality of that terrorist party) shall be subject to execution or attachment in aid of execution in order to satisfy such judgment to the extent of any compensatory damages for which such terrorist party has been adjudged liable.

TRIA § 201(a). Under TRIA, "terrorist parties" include foreign states that have been designated as state sponsors of terrorism. *Id*. § 201(d)(4). Subject to several exceptions, "blocked assets" are defined as assets seized or frozen by the United States under the Trading with the Enemy Act ("TWEA"), 50 U.S.C. app. § 5(b), or the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701, 1702. *See* TRIA § 201(d)(2).

In 1979, the Department of State designated Syria as a state sponsor of terrorism, pursuant to the Export Administration Act, 50 U.S.C. App. § 2405(j). In 2005, the Department of the Treasury promulgated the Syrian Sanctions Regulations ("SSR"), blocking "[a]ll property and interests in property that are in the United States, that come within the United States, or that

are or come within the possession or control of any United States person . . . of the Government of Syria. . . ." 31 C.F.R. § 542.201(a)(1). The SSR further prohibits these blocked assets from being "transferred, paid, exported, withdrawn, or otherwise dealt in," *id.*, "except to the extent the transactions are authorized by regulations, orders, directives, rulings, or otherwise," *id.* § 542.201(d).

B. Factual and Procedural Background

Petitioners allege – and no party has disputed – that they are victims and family members of victims of a 1985 terrorist incident in which three Americans were shot and thrown from an Egypt Air plane onto a tarmac. Petitioners filed suit seeking relief arising from this incident, and, in 2011, obtained a default judgment (the "Judgment") for approximately $600 million. *See Baker v. Socialist People's Libyan Arab Jamahirya*, No. 03-cv-0749 (D.D.C. Mar. 30, 2011). The Judgment was entered pursuant to 28 U.S.C. § 1605A.

On October 15, 2012, Petitioners filed the instant action to attach and execute on assets in the Southern District of New York in satisfaction of the Judgment. On June 24, 2016, Petitioners filed a Turnover Motion, seeking the turnover of funds (totaling approximately $1.6 million) in seven accounts held by JPMorgan Chase, Intesa Sanpaolo SPA, Citibank, and BNY Mellon (the "Defendant Banks"); these funds are blocked under the SSR. *See* ECF Nos. 425, 431. Although Petitioners acknowledge that the originating banks that transmitted these funds to the Defendant Banks were not agencies or instrumentalities of Syria, *see* ECF No. 431 at 4, they nonetheless allege that the funds are attachable under TRIA, in part because the Defendant Banks served the originating banks with interpleader petitions, giving them "the opportunity to assert any claim to the Disputed Assets," s*ee id.* at 5, and none of the originating banks responded. Thus, Petitioners allege that the originating banks have waived any claim to the disputed assets. *Id.* at 6.

On July 22, 2016, the Defendant Banks filed an opposition to the Turnover Motion, relying principally on *Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993 (2d Cir. 2014), and *Hausler v. JP Morgan Chase Bank, NA*, 770 F.3d 207 (2d Cir. 2014), and arguing that the Second Circuit has held that "for a blocked [electronic fund transfer ('EFT')] to be subject to turnover, the entity that *immediately* preceded the bank in the wire transfer chain, and directly transmitted the EFT to the bank, must be an instrumentality of the judgment debtor, here Syria." Opposition to Turnover Motion (ECF No. 434) at 6 (emphasis in original). Because Petitioners concede that the originating banks were not agencies or instrumentalities of Syria, the Defendant Banks argue that the Turnover Motion must fail. Moreover, the Defendant Banks contend that "[n]othing in *Calderon-Cardona* or *Hausler* suggests that an originating bank's disclaimer of an interest in a blocked EFT automatically shifts the property interest in the EFT to the originator." *Id.* at 14.

On August 5, 2016, Petitioners filed a reply brief (ECF No. 440), citing *Vera*, which held that the EFTs at issue there must be turned over because certain banks assertedly disclaimed any interest in the funds. *See* Plaintiffs' Reply at 6. The Court granted leave for the Defendant Banks to file a sur-reply to address *Vera*, and the Defendant Banks did so (ECF No. 450), arguing that *Vera* conflicts with Second Circuit precedent, and, further, observing that the United States disagreed with *Vera*'s reasoning in a Statement of Interest filed in *Martinez v. Republic of Cuba*, No. 07-cv-6607 (VM) (S.D.N.Y.).

ARGUMENT

A. Recent Second Circuit Precedent Strictly Limits the Attachment of Blocked Electronic Funds Transfers

The Second Circuit has held that, under New York property law principles, TRIA and/or the FSIA may permit attachment of EFTs that have been blocked midstream, but only if the

foreign state itself or an agency or instrumentality thereof (such as a state-owned financial institution) transmitted the EFT directly to the bank where the EFT is held pursuant to the block. *See Calderon-Cardona v. Bank of New York Mellon*, 770 F.3d 993, 1002 (2d Cir. 2014); *see also Hausler v. JP Morgan Chase, N.A.*, 770 F.3d 207, 212 (2d Cir. 2014). Accordingly, under *Calderon*-Cardona and *Hausler*, Petitioners must establish that the foreign government or agency or instrumentality thereof transmitted the EFTs sought to be attached directly to a garnishee bank in order to show that the assets are attachable property under TRIA and the FSIA. As both parties agree, Petitioners cannot make such a showing here.

B. Contrary to the *Vera* Holding, a Bank Cannot Disclaim Its Interest in Property Blocked Pursuant to the Syrian Sanctions Regulations

In *Vera*, the plaintiffs filed a petition seeking turnover of a $3 million EFT "emanating from Cuba, or its agencies or instrumentalities, transmitted to New York banks for clearance purposes, and blocked pursuant to the [CACR]." *See Vera* Slip Op. at 2. In response to the petition, HSBC Bank USA N.A. ("HSBC"), the New York intermediary bank that held the blocked account, filed an interpleader petition to resolve claims on the $3 million transfer. *Id*. at 2. HSBC stated that the blocked transfer was initiated by a Cuban bank, Banco Internacional de Comercia, S.A. ("BICSA"), which instructed ING Bank France, Succursale de ING Bank N.V. ("ING") to transfer the $3 million from a BICSA account at ING to another BICSA account at Banco Bilbao Vizcaya Argentaria, S.A. ("BBVA"). *Id.* at 3. Consistent with this statement, the parties later stipulated that a Cuban bank had initiated the $3 million transfer, and was also the intended beneficiary of the transfer. *Id*. at 4. Neither BICSA nor ING responded to the interpleader petition. *Id*. at 3.

In opposing the attachment motion in *Vera*, HSBC argued that the blocked EFT was not subject to attachment under TRIA or the FSIA, because the plaintiff could not establish that the EFT was the property of Cuba for purposes of New York law. *Vera* Slip Op. at 4-5. In making this argument, HSBC relied on the Second Circuit's decisions in *Calderon-Cardona* and *Hausler* holding that an EFT blocked midstream is the property of a foreign state or of its agency or instrumentality only if the state or its agency or instrumentality transmitted the EFT directly to the bank holding the blocked EFT. *See id.* HSBC reasoned that, because the funds were transmitted to HSBC (a U.S. bank) by HSBC Bank plc, a United Kingdom bank, the EFT was not Cuban property for purposes of TRIA or the FSIA. *Id.*

The *Vera* court's rejection of this argument was erroneous. The *Vera* court ruled that, because HSBC Bank plc was not interpled, and because ING did not respond to the interpleader petition, "any potential interest in the chain of transactions leading from BICSA to HSBC has been disclaimed." Ex. A at 6. The court further concluded—without citing any legal authority—that, for the purposes of *Calderon-Cardona* and *Hausler*, the blocked assets were to be "considered to have been transmitted to HSBC directly from BICSA." *Id.* Thus, *Vera* appears to be premised on the unsupported assumption that where originating and intermediary banks "disclaim" interests in blocked assets, the assets may be considered to be the property of the originator. Because the originator in *Vera* was an instrumentality of Cuba, Judge Hellerstein found that the blocked EFT was Cuba's property, and that it was therefore attachable under TRIA and the FSIA. *Id.*

The reasoning in *Vera* conflicts with governing OFAC regulations, which the *Vera* opinion does not address. Under the Cuban Asset Control Regulations that governed in *Vera*, a foreign bank is prohibited from disclaiming any interest in property subject to the jurisdiction of

the United States, if Cuba also has an interest in that property. Specifically, section 515.201(b)(2) of the CACR prohibits "[a]ll transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States" if the transfers involve property in which Cuba (or its agency or instrumentality) has or had "any interest of any nature whatsoever, direct or indirect." The word "transfer" is specifically defined to include "any actual or purported act or transaction, . . . the purpose, intent, or effect of which is to create, *surrender, release*, transfer, or alter, directly or indirectly any . . . interest with respect to any property." 31 C.F.R. § 515.310 (emphasis added).

In *Vera*, there was no dispute that the blocked EFT was subject to the jurisdiction of the United States or that Cuba had an interest in the property. Therefore, under section 515.310, ING and HSBC Bank plc were prohibited from "surrender[ing]" or "releas[ing]" their interests in the EFT that was blocked in New York and intended for a Cuban beneficiary. Moreover, the CACR specifically provides that any transfer in violation of the CACR involving property in which Cuba has an interest "is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power or privilege with respect to such property." 31 C.F.R. § 515.203(a); *see also Zarmach Oil Services, Inc. v. U.S. Dep't of the Treasury*, 750 F. Supp. 2d 150, 157 (D.D.C. 2010) ("OFAC regulations . . . provide only one method by which the Sudanese Government's interest in the funds may be extinguished: a valid license from OFAC . . . and contain no provision by which the efforts of a sanctions target and a company it wishes to do business with can, on their own, 'un-block' assets frozen by OFAC." (citations omitted)). Thus, under the CACR, any "disclaimer" by ING or HSBC Bank plc would be "null and void,"

and could not operate to transfer the property interest in the blocked asset to Cuba, or its agencies or instrumentalities.

The same holds true under the SSR, whose relevant provisions are functionally identical to those in the CACR described above. *See* 31 C.F.R. §§ 542.201(a) (prohibiting transfers involving property of Syria or its agencies or instrumentalities); 542.317 (defining "transfer" as including, among other things, the "surrender" or "release," directly or indirectly, of any interest with respect to any property); 542.202(a) (any such attempted surrender or release would be "null and void"). Petitioners raise the same incorrect argument that Judge Hellerstein adopted in *Vera* – namely, that the originating banks waived their interest by failing to respond to the interpleader petition, that Commerzbank disclaimed any interest in the accounts Petitioners seek to attach here, and that this disclaimer renders the accounts attachable under TRIA and the FSIA. The United States takes no position as to whether Commerzbank ever purported to disclaim any interest in the EFTs at issue here, but, even if it did, then under the SSR, Commerzbank cannot surrender or release its interests in the blocked EFTs, nor can the originating banks waive their interest, as any attempt to do so would be "null and void." *See* 31 C.F.R. § 542.202(a). Thus, the reasoning in *Vera* should not be adopted and applied here. *Vera* did not consider or analyze the impact of the CACR on intermediary banks' purported attempt to "disclaim" or waive an interest in an asset subject to the regulations. The result it reached is erroneous, and contrary to the United States' important interest in guarding against unauthorized dissipation of assets that are properly subject to its international sanctions programs.[3]

[3] This Statement of Interest does not address a separate argument as to whether an exception to Article 4A of the New York Commercial Code applies to the EFTs here, on the theory that this exception, when applicable, shifts the risk of loss of the transfer from the originating bank to the originator itself, removing the originating bank's interest in the asset. In addition, the Government takes no position on whether Petitioners have met the other

CONCLUSION

For the foregoing reasons, the Court should not adopt the theory advanced by Petitioners that the assets at issue here are subject to attachment pursuant to *Vera*.

Dated: New York, New York
September 28, 2016

Respectfully submitted,

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requirements of TRIA and the FSIA for attachment, including whether any of the entities are properly agencies or instrumentalities of Syria.